

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARL WILSON, et al.
Plaintiffs,

vs.

HARPERCOLLINS PUBLISHERS, INC.
Defendant.

NO. 94-CV-892 JC

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
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[MOTION FOR SUMMARY JUDGMENT]

Transcript of Proceedings before The Honorable
John E. Conway, Chief United States District Judge,
Albuquerque, Bernalillo County, New Mexico, commencing
on July 2, 1997.

Appearances of Counsel:

For the Plaintiffs: Ernesto Romero
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1 (Albuquerque, Bernalillo County, New Mexico;
2 July 2, 1997, in open court.)

3 THE COURT: Good morning. We're here in the matter
4 of Wilson versus Harpercollins, two motions for summary
5 judgment. I'd like to hear the motion on Audree Wilson first.

6 MR. DIXON: Your Honor, I'd like to introduce
7 Mr. Rich. I think you know him. He's argued the prior two
8 motions before you.

9 THE COURT: That's fine. He can argue a third one.

10 MR. RICH: Good morning, Your Honor.

11 THE COURT: Are you the one I delayed this trial for?
12 Or this hearing for? Or was that you?

13 MR. LANGBERG: That was me, Your Honor. I appreciate
14 it very much.

15 THE COURT: That's all right. It worked out fine.

16 MR. LANGBERG: It worked out very well.

17 THE COURT: What did you do, just fly in this
18 morning?

19 MR. LANGBERG: Yes, the flight used to be earlier,
20 and I didn't realize it until it was too late. I appreciate it.

21 THE COURT: Okay.

22 MR. RICH: Your Honor, on Audree Wilson, there are
23 two basic points which our briefs address which I can very
24 briefly cover orally. The first, which we don't see contested
25 from the other side, is the requirement contained in the uniform

1 jury instructions, 13-10-02 that a prima facie, to establish a
2 prima facie case for defamation in the State of New Mexico, the
3 eighth element set forth is a requirement that, quote, "The
4 communication proximately caused actual injury to plaintiff's
5 reputation."

6 That's a requirement, Your Honor, which is separate
7 from whatever showing might or might not be able to be made
8 respecting any damages, if the prima facie elements of liability
9 are first established.

10 In Ms. Wilson's deposition, she was unable to
11 identify at all any injury to reputation. She was unable to
12 identify a single communication of which she was aware, either
13 personally directed to her, directed to anyone and then
14 communicated to her adversely impacting on her reputation. No
15 one indicated that they had developed a lesser opinion as to her
16 and so forth. And there is simply a record barren of any
17 information.

18 As we read a number of authorities in the state
19 interpreting 13-10-02, most recently Cowen versus Powell which
20 is a New Mexico Court of Appeals decision in 1993 indicating
21 that this is a necessary element to be established as part of a
22 claim, and most recently Judge Campos' adoption of that --

23 THE COURT: It's Campos, Judge Campos.

24 MR. RICH: Campos, thank you, Your Honor.

25 THE COURT: Campos. The only person that calls him

1 Camp-rose is Judge west from Oklahoma City, and he just doesn't
2 know that.

3 MR. RICH: Happy to be corrected, Your Honor. He
4 just very recently this year identified in his opinion
5 dismissing the motion the need to demonstrate this element, so
6 our first point that we develop further in the brief is there
7 has been absolutely no showing, and without that showing she
8 can't move forward and prove the elements of the defamation
9 claim.

10 Respecting the underlying allegations themselves,
11 Your Honor, what remains, as you know, is the allegation that
12 she passively tolerated abuse by Murray. Once again, when we
13 review the deposition record carefully in our papers, and what
14 we find is the following: We find, first of all, very little
15 memory on Audree's part about any of the specifics of Murray's
16 comportment to her sons. She basically said, and I can
17 understand it, she said, quote, "It's difficult to remember
18 unpleasant times." It was clear that she was unhappy. The
19 stress at the time about the level of physical punishment
20 administered by Murray on various occasions. She testified
21 variously that she was either present or within earshot of a
22 number of instances of physical punishment of her sons. She
23 professed not to have any specific recollection of the details
24 of that punishment except that she indicated that she believed
25 them to be excessive.

1 Notably, when I read her one passage from a prior
2 work by Steven Gaines which was published in 1984, I just want
3 to read you one passage from the deposition at pages 278 to 280,
4 Your Honor: I said, "Ms. Wilson, I'm going to read you a
5 passage from Mr. Gaines' 1984 book on the Beach Boys and ask you
6 a few questions about them. Quote" -- this is now quoting from
7 Mr. Gaines -- "'Murray's father beat him. Murray beat his
8 children. Audree watched helplessly from the sidelines,
9 according to Dennis,'" who you know, I think, is the brother,
10 "frightened of Murray herself." Quoting Dennis, quote, "'Oh,
11 please, Murray, no, don't do that.'" That's words attributed to
12 Audree.

13 And then I asked Ms. Wilson, "Are those passages
14 quoting from -- claiming to quote from Dennis and you accurate?"

15 "Answer: I think they are."

16 So here she flatly, frankly, conceded to a
17 characterization by Mr. Gaines reportedly based on interviews
18 with Audrey herself and the deceased brother -- Dennis, her son,
19 Dennis -- in which she acknowledges what everybody knows, which
20 is Murray was very abusive and that she, quote, "watched
21 helplessly from the sidelines." That's really the gist of the
22 passages which are disputed elsewhere by Ms. Wilson.

23 It seems, Your Honor, that she bears the burden of
24 demonstrating the falsity of these passages. We dispute,
25 incidentally, the suggestion in the plaintiff's brief that there

1 is no manner of public concern involved here, and, hence, the
2 burden of truth/falsity shifts. We think the case law which we
3 cite makes clear that, in any media setting, the concept of
4 public concern and public interest is broadly construed and
5 interpreted, and that the strong presumption in these cases is
6 that most anything which the press decides it ought to write
7 about -- I don't mean to sound arrogant but this is what the
8 cases basically do, they defer to the judgment of the press as
9 to what's newsworthy.

10 More importantly, in this setting where we're talking
11 about abuse, we're talking about activities which Mr. Langberg,
12 in his brief, identifies as criminally punishable under the
13 State of California law. It seems almost by definition they're
14 matters of public concern.

15 That being the case, Ms. Wilson has the burden of
16 proving falsity. Where she testifies to a dim memory at best,
17 can't recall her comportment, at most said that she never stood
18 up to Murray in the face of any episode, that she would go
19 privately into a back room and talk to him and express whatever
20 anger or outrage she had. If anything, it's entirely consistent
21 with what Brian observes at page 27 of the book, Your Honor:
22 Quote, "My mother was no help. She almost never opposed my
23 father, almost never rose up and defended her children, not that
24 we saw anyway."

25 Completely consistent, Your Honor, with what Audree

1 said, which is, I never did anything demonstrably in front of
2 the sons. It was all done, if at all -- and her memory is very
3 vague -- privately behind closed doors.

4 How can Brian be faulted for making the observation
5 that she never interceded in front of them anyway? It's
6 entirely accurate as we read the transcript. Those are our
7 central positions.

8 THE COURT: Is there any testimony that anyone has
9 ever read this book?

10 MR. RICH: No, and she had not, except I think
11 selected portions.

12 THE COURT: Actually, my question is, has anybody in
13 the general public read this book?

14 MR. RICH: There is sales data, Your Honor. About,
15 roughly, 50,000 copies were sold nationally, which by standards
16 of a book of this type is very modest, and that's as much as we
17 know. There were efforts early on, in interrogatory responses
18 by the plaintiff, to identify one or more parties allegedly who
19 formed a diminished opinion of Carl and/or Audree as a result of
20 the book, and everything we chased down on that demonstrated
21 that those were frivolous and insubstantial indications.
22 There's nothing in the record. Nobody has stepped forward.
23 There isn't a shred of evidence in the record to show that her
24 injury has been -- that her reputation has been injured one
25 scintilla.

1 THE COURT: Thank you, sir.

2 MR. RICH: Thank you.

3 THE COURT: Mr. Langberg, I want you to concentrate
4 on telling me how there is actual harm to her reputation.

5 MR. LANGBERG: Can I deal -- with the court's
6 permission, I can deal with the legal aspect of that question as
7 well as the factual aspect of that question because I think it's
8 important as to what's required.

9 Mr. Rich cited the jury instruction, and he cited
10 10-02, I think it's also very important to look at 10-10 in
11 particular, the committee comment on 10-10. And what basically
12 10-10 says is that the law in this area, harm to reputation has
13 been damaged is evolving and unclear, particularly in a
14 situation, you have a private plaintiff and a matter not of
15 public concern.

16 Now, we know we have a private plaintiff, the Court
17 has already found that. Mr. Rich makes an argument that this is
18 a matter of public concern. I submit that it is not. Standing
19 by and watching child abuse 30 years ago is not a matter of
20 public concern. If it's not, then according to the committee
21 note, and according to -- first of all, New Mexico's never
22 decided the issue. All the cases cited by Mr. Rich involve
23 matters of public concern, and I believe all of them involve
24 public figures, but I can't remember for sure, so I won't make
25 that representation, but I think they do.

1 We have here, instead, a private figure, not a matter
2 of public concern. We have a situation that we had in Time,
3 Inc., versus Firestone, U.S. Supreme Court case, where we had a
4 private figure, matter not of public concern, Mrs. Firestone of
5 the famous Firestone family, getting a divorce, Your Honor, and
6 basically part of the holding in that case was that the U.S.
7 Supreme Court said an emotional distress injury was sufficient.

8 Here we have a woman who has testified to emotional
9 distress clearly on the record, clearly in her deposition. She
10 said that it's -- she felt emotional distress, she said she got
11 headaches, she said it made her shy or withdrawn in relation to
12 other people. There was clear testimony of emotional distress.

13 And, by the way, Mr. Rich points out that one of his
14 colleagues in the defense -- libel defense organization says in
15 his treatise that Audree Wilson's testimony is not good enough
16 for proving emotional distress. I don't think that -- no cases
17 are cited, and I don't think Mr. Sack is an authority on what's
18 admissible evidence in this court. Certainly in any case of
19 emotional distress, the plaintiff's testimony is evidence.

20 And I think that we have here emotional distress. We
21 have here a situation where a person who knows the book has been
22 circulated, Mr. Rich says 50,000 copies, and that was along with
23 a national promotional tour. It may not have been as successful
24 as they wanted, but there was a national tour promoting this
25 book. And a person who knows the book has been circulated and

1 who basically doesn't know -- basically thinks, well, what are
2 people thinking of me? And it has caused her emotional
3 distress, we have evidence of it. The jury may not believe her
4 when she testifies to her emotional distress, although I submit
5 she would, it's not an uncommon situation in a libel case that
6 that is the -- in Burnnett versus National Enquirer, for
7 example, the only evidence of emotional distress was the
8 plaintiff's testimony. The jury has the right to believe it or
9 disbelieve it.

10 And so I think, in the context of a private
11 plaintiff, a matter not of public interest, something that
12 happened 30 years ago, not of public concern, I think the Time
13 versus Firestone theory is good law and would be adopted in New
14 Mexico, and that is emotional distress is sufficient injury in
15 this kind of a case.

16 I think that the only other issue that -- that's my
17 answer to the Court's question. Hopefully, it's sufficient. I
18 would like to address the issue of -- the factual issue briefly,
19 if I might, in relation to this -- is it true what they -- what
20 they said, because Audree Wilson happened to testify at her
21 deposition that her husband, to her knowledge, actually struck
22 the children.

23 And I think once she said he used a belt and the
24 other times he used an open hand. All I can -- I have a few
25 points. First of all -- well, basic -- you know, my father

1 disciplined me with his hand sometimes, but I would never -- I
2 would take umbrage at anyone that portrayed him as beating me
3 with a 2 by 4, tying me to a tree, forcing me to defecate, and
4 forcing me to go without meals for a couple of nights. That is
5 a whole lot of difference.

6 And in California, as we point out in the brief,
7 there is a statute that allows reasonable parental discipline,
8 and there is a criminal statute for child abuse. And when it
9 came to the abusive -- the testimony of the abuse, was that
10 true, for example, forcing Brian to defecate on a newspaper, and
11 forcing the brothers to stare into the socket of a false eye,
12 her answer was, total unmitigated gall and lie, lie, lie. She
13 wasn't equivocal about it. She didn't remember it. She said it
14 was lies.

15 And so there's no evidence of any kind whatsoever; in
16 fact, evidence that it didn't happen, that Brian was beaten with
17 2 by 4s, that he was tied to a tree, forced to defecate, all of
18 those horrible things.

19 And I think that there is -- Audree testified clearly
20 that that's false, and there's no evidence that it's true. I
21 think that because the statements are false, because the
22 emotional distress damage is sufficient, that -- especially when
23 the book sold 50,000 copies circulated across the country -- we
24 have a motion for summary judgment as to Audree that should be
25 denied.

1 THE COURT: The law in New Mexico is that she has to
2 prove actual harm to reputation. There's no showing there is
3 any actual harm to her reputation. At page 243 of her
4 deposition, she's asked if anybody thought less of her because
5 of the publication. She responded, "No." So summary judgment
6 will be granted as to Audree Wilson. We'll proceed to Carl
7 Wilson.

8 MR. RICH: Your Honor, as to Carl, from our
9 perspective, the best way to view the issues analytically is to
10 break them into two broad component parts. There are several
11 statements in the book which, if provably false, clearly we
12 would concede would be defamatory of Mr. Wilson's reputation and
13 would potentially give rise to damages claims. Those are
14 specifically allegations respecting drug -- his use of drugs and
15 alcohol.

16 There's a second, much broader, category which deal
17 with alleged characterizations, adjectives, if you will, claimed
18 either to be explicitly contained in the text of the book or one
19 level removed, that one might infer from the passages in the
20 book, which fall into the range of characterizations, unfair in
21 Carl's mind, of Carl's thoughts, feelings, emotions, and Brian's
22 personal perspective of concepts of callousness and
23 insensitivity, and we feel those fall into an entirely separate
24 category.

25 I'd like to review each of those briefly, if I may.

1 Particularly, focusing on the first level of allegations, those
2 that really have a factual component. I think what the entire
3 record of the case has now disclosed is that Carl played a game,
4 Your Honor. He made allegations. If I may use a chart or two
5 for purposes. Can Your Honor see this?

6 THE COURT: Yes, sir.

7 MR. RICH: He made allegations in the complaint, his
8 lead allegations, that the book falsely portrayed him as an
9 abuser of alcohol. That it imputed to to him involvement in the
10 purchase of illegal narcotics. He knew that a number of
11 episodes recounting these events were either fairly private in
12 nature or remote in time and place and undoubtedly assumed that
13 Harpercollins would have a difficult, if not impossible time,
14 dealing with his denials as to them. Unfortunately, based on
15 the record, I think he either caught himself at his deposition
16 or we caught him.

17 Respecting allegations of illegal purchase of --
18 purchase of illegal narcotics, there's all --

19 THE COURT: You might angle that a little bit toward
20 me, if you would, please.

21 MR. RICH: Sure.

22 THE COURT: Yeah, that's fine.

23 MR. RICH: Does that work?

24 THE COURT: Yes.

25 MR. RICH: There's all of one passage in the book,

1 Your Honor, page 251, addressing Carl's prior use of cocaine.
2 And as the passage indicates, Your Honor, it says, "The next
3 year, 1978, began with a three-week tour," and so forth, that
4 "This time Carl was coming off a long cocaine problem." On the
5 right side of this chart, Your Honor, is the relevant deposition
6 excerpt in which Carl concedes that in the period through late
7 summer of 1977, from the period '76 through late summer '77, he
8 was using cocaine and illegal -- purchasing cocaine from drug
9 dealers. That's conceded in his deposition. It's entirely
10 consistent.

11 What he tried to do in his deposition was to argue
12 that the reference to, Carl was coming off a long cocaine
13 problem was false and defamatory. Why? Because he was already
14 off it at the beginning of '78, since the summer '77, so that he
15 was not literally, quote, coming off it, but was off it for a
16 period of arguably four or five months. Gosh, if -- I hope
17 that's not what libel litigation through trial is about because,
18 basically, he's conceded what the defamatory sting is alleged to
19 be in the first chart, Your Honor, namely his involvement in the
20 purchase of illegal narcotics.

21 More testimony is devoted to the so-called heroin
22 incident. Your Honor, there was quite a -- quite a melee in a
23 room in Austrailia during a tour in 1978, and it's recounted in
24 several prior books and very partially recounted in Brian
25 Wilson's book. And the passage that caught Carl's attention for

1 purposes of the complaint is the one we set forth in the
2 left-hand portion of this next chart, which is the allegation
3 that "Carl, trying to calm the turbulence" -- that's at this
4 meeting that occurred -- "by admitting his involvement in the
5 purchase of the heroin, ended up getting punched in the face by
6 Rocky."

7 We had numerous denials at his deposition that he had
8 ever made the purchase. I'll read you but one, from pages 457
9 and 458 of Carl's deposition. "Did you have any involvement in
10 the actual purchase of heroin?

11 "Answer: God, no.

12 "Or whether to flush it down the toilet, or to supply
13 it to Brian or to Dennis or to anyone else?

14 "No, no, no, absolutely did not happen. Absolutely
15 didn't happen.

16 "And anyone who would testify that it happened would
17 be lying?

18 "Answer: That's correct, including Brian."

19 As Your Honor knows from reviewing the papers, quite
20 fortuitously, to our surprise, we located a magazine article
21 that was written in 1978 within weeks of the incident itself,
22 and more remarkably the -- we located the reporter in Sydney
23 Australia and he had retained the tape of an interview with Carl
24 whose relevant portion is set forth in this middle column here.
25 I'm not going to read it, Your Honor, it's there.

1 In that tape and in that interview, Carl admitted to
2 the very buy which he denied repeatedly he had done in his
3 deposition. This was also published incidentally, Your Honor,
4 in 1978, the same quote, in the magazine article, and Carl
5 testified at his deposition that he was aware of that article,
6 claims he never read it, but that it had said some terribly
7 embarrassing things, and it was something he had tried not to
8 think about much in recent years, so it was out there in the
9 public record, never responded to by Carl.

10 But, in any event, it's on the tape, and Your Honor
11 has a copy of the tape. And so we have this. We have
12 Mr. O'Grady, in a present affidavit, testifying to his
13 recollection of the interview, testifying to his specific recall
14 of Carl's statements respecting the purchase of heroin, and
15 we've had the tape analyzed, as you know from an affidavit, not
16 a copy, not a copy of the tape, which is what the plaintiffs
17 looked at, never asked us for the original, never asked to
18 authenticate it.

19 They took the copy, gave it to Mr. Pearl who says,
20 well, I can't really work with a copy, but I have suspicions.
21 We gave the original to a tape expert, and his affidavit of
22 authenticity accompanies our papers, Your Honor.

23 So what does Carl do? Carl says, well, that's not
24 really -- that's not really what I'm complaining about. Even
25 though the complaint, Your Honor, talks about imputing to Carl

1 involvement in the purchase of illegal narcotics, and that's
2 what we've demonstrated to be absolutely true, not only as to
3 the cocaine but as to the heroin. The lead charge of these
4 summary judgment opposition papers is, no, no, no, whether or
5 not I bought the heroin, this passage, the one we cite on the
6 left here, Your Honor, somehow suggests or implies that I
7 supplied it to my brother, Brian.

8 Now, I've read this passage, Your Honor, any number
9 of times. I don't see it. It's not there. It was never
10 claimed to be there. It was never charged as a gist of
11 allegation or allegation of defamation in the complaint. I
12 don't see it in the complaint. And at his own deposition, Your
13 Honor, in this case, at pages 453 and 454, Carl himself agreed
14 that that passage does not say that he supplied heroin to Brian.
15 He himself recognized in his deposition that the passage has
16 nothing to do with what he claims is now belatedly the
17 defamatory import of it.

18 I don't know how our client, Your Honor, can be asked
19 to respond to alleged implications that don't exist, that aren't
20 fairly there, and that legally no reasonable reader would infer
21 from the passages.

22 13-10-07 of the uniform jury instructions instructs
23 us that in deciding whether a communication is defamatory you
24 must consider its plain and obvious meaning. I would submit to
25 Your Honor, consistent with numerous authorities in this state

1 and out, construing what plain and obvious meaning is that that
2 passage set forth on the left side of this chart cannot
3 conceivably reasonably be read, let alone have its plain and
4 obvious import be read, as indicating that Carl, whether or not
5 he bought the heroin, had supplied it to Brian. It's just not
6 there. The complaint says, Your Honor, paragraph 20, that the
7 book falsely portrays Carl as an abuser of alcohol. The next
8 chart sets forth his testimony on that subject, Your Honor.

9 I almost fell out of my seat when he spilled this out
10 at his deposition because I couldn't imagine how someone could
11 give that testimony consistently with that allegation in the
12 pleading. He basically said that for years and years he was a
13 day drinker, a night drinker, a binge drinker. He used the word
14 terrible abuse. Those are his own words, Your Honor. We got it
15 right, we got it right in context. There's nothing wrong with
16 the book saying it. It's there, and he admitted it openly in
17 his deposition. I was absolutely stunned and still to this
18 moment can't understand how somebody could bring a complaint,
19 the lead allegation of which is that the book falsely portrays
20 Carl as an abuser of alcohol and then testify as he did at his
21 deposition.

22 Now that leaves Your Honor a whole host of other
23 passages in the book, and the problem we have in grasping the
24 arguments from the other side is that they keep moving. We
25 address very, very specifically, and our papers tried to be very

1 faithful to the record, each and every factual allegation that
2 we thought might remotely give rise to a defamation claim in
3 this lawsuit.

4 And our papers very carefully go through the
5 substantial truth we developed as to most, if not all, of those.
6 On this motion, what we're seeing is taking passages which say
7 one thing, and we're getting again suggestions that they really
8 mean something else and then taking Harpercollins to task for
9 not having addressed those suggestions either by omitting other
10 information, which the plaintiffs would have preferred had been
11 published, or allegedly not addressing the defamatory sting.

12 I'll just give you two or three examples of the point
13 I'm trying to make: There are certain passages in the book,
14 Your Honor, which discuss in 1983 the group's decision to
15 reengage Dr. Landy to treat Brian, and of course he's very
16 controversial.

17 Above the yellow highlighting is what the complaint
18 sets forth that are the defamatory passages in the book. The
19 complaint charges -- and Carl in his deposition echoed the
20 view -- that those passages indicated or portrayed Carl as
21 willing to risk Brian's life, willing to risk Brian's life, to
22 save money.

23 Well, what they didn't publish in the complaint, Your
24 Honor, and certainly don't highlight, is the
25 immediately-following colloquy that we've highlighted in yellow.

1 This directly follows at page 276 of the book. Hornbook
2 definition law says that you've got to look at everything in its
3 proper context, certainly within the context of the passage.

4 "We want him to get well,' Mike said." That's a
5 reference to Mike Love. "I don't care if he ever sings, plays
6 again, or makes one more note of music,' said Carl.

7 "Yeah, we just want him to be well and happy,' added
8 Mike."

9 Again, it baffles us, Your Honor, how, in its proper
10 context, that statement in the book indicating Carl's concern
11 overall for Brian's well-being, to the point where he doesn't
12 care if he ever sings or plays again, can be twisted in this
13 lawsuit into an assertion that this passage indicates that Carl
14 was willing to risk Brian's life to save money.

15 Another example, Your Honor, deals with something
16 called the Brian Wilson Trust of 1982. Carl asserts that the
17 book's discussion of that trust portrays him as engaging in
18 trickery of Brian, of wrongfully withholding money from Brian.

19 Well, you read the passage, and you certainly don't
20 see it. What you do see is Brian indicating that he didn't
21 really understand what that trust was about, and when later on
22 he came -- and that later on he came to question whether the
23 trust was something that was in his best interests or not.

24 Well, what does Carl say at his deposition? Carl at
25 his deposition indicates that at the time the trust was

1 negotiated and entered into with Brian, Brian was suffering
2 severe physical, psychological, and mental difficulties.

3 He was, in Carl's mind, incompetent or effectively
4 incompetent as of 1982. In other words, Your Honor, it's
5 exactly consistent with Brian's exhortations in the text dealing
6 with these passages saying, I didn't know what I was signing.
7 He didn't, in fact, know what he was signing, if you agree with
8 Carl's characterization of Brian as of 1982.

9 The papers in opposition also, Your Honor, make much
10 of the fact that the book made a mistake in one respect. The
11 book did not reference a co-trustee named John Brown. If one
12 were to look at the trust agreement -- it's Exhibit G to our
13 opening brief respecting Carl, Your Honor -- there were two
14 trustees, not one. There was Mr. Branca, and there was Carl
15 Wilson.

16 Carl argues that by omitting the fact that he was
17 merely co-trustee, that somehow all of the reactions that Brian
18 had to the desirability or not of the trust come back and hit
19 him squarely between the eyes; whereas, he argues, all of the
20 decisions were really made by Mr. Branca.

21 The problem with that testimony is, Your Honor, if
22 you look on the face of the trust agreement, all activities
23 undertaken had to be undertaken by the unanimous action of the
24 trustees. So you talk about an immaterial, because the passages
25 would have been entirely correct had it said as co-trustee, he

1 did the following things, that's really the nature of how they
2 will take a passage, innocent, substantially accurate, and twist
3 it.

4 The last example I'll give Your Honor, which to me it
5 takes the cake, is citing a claim by Brian that Carl
6 characterized at one point, his music as sounding crazy. All
7 right, maybe he did, maybe he didn't, but here's what Carl
8 claims that calling something sounding -- music sounding crazy
9 implies. It implies that he's unsupportive of Brian, uncaring,
10 interfering in therapy, callous, and greedy about use of the
11 studio. All from the words "music sounding crazy."

12 I dare say we all have opinions about music, even
13 Carl I suspect. I don't know that it would ever be viewed as a
14 jury question whether Brian was sincere in his view that his
15 brother viewed something as crazy or not. The point is it
16 doesn't give rise to a libel lawsuit.

17 Your Honor, I'm not going to rehearse, unless you
18 want me to, the law dealing with opinion, but we feel very
19 strongly that characterizations, even to the extent, fair ones,
20 of callousness, of indecisiveness, of insensitivity and the
21 like, let alone that music sounds crazy, are simply not the
22 stuff of a defamation suit.

23 I would be perplexed how to have a jury decide
24 whether a characterization, those use of adjectives, are
25 susceptible of being proven true or false, and if there is a

1 touch stone in the law opinion in the State of New Mexico and
2 broadly it is that if a statement is not subject to being
3 verified it is opinion, it is protected speech under the First
4 Amendment. And we find that at the end of the day, even if you
5 accept it at face value, the extrapolations of the statements
6 and/or to agree hypothetically that they characterize Carl with
7 all of these adjectives which upset him, we say, at the end of
8 the day, those are still not actionable. Your Honor, that's, in
9 brief, our position.

10 THE COURT: Thank you very much, sir.

11 MR. RICH: Thank you.

12 MR. LANGBERG: May I use your chart?

13 Your Honor, I think, if I could, I would like to
14 address this issue of the tape recording first because I think
15 it's sort of indicative of what we have. And I must say, just
16 as a side-light, that I was -- you know, 30-odd years ago I was
17 a policeman, and I worked undercover, and I made a lot of tape
18 recordings, and I listened to a lot of tape recordings on this
19 kind of subject, and I would hate to think that a tape -- that
20 this tape recording can be -- can be construed, in spite of what
21 it says, actually, on the tape and in the original article that
22 was written by Mr. O'Grady, can be construed to think that Carl
23 Wilson bought drugs, bought heroin for his brother or for anyone
24 else, as opposed to the opposite, and, that is, flushed it down
25 the toilet.

1 This is interesting because we have the challenged
2 passage from the book. We have Carl's statements to O'Grady as
3 recorded on audio tape and the O'Grady affidavit.

4 There's a couple things left out that we need to look
5 at. What we have is we have the tape itself, and I don't know
6 if Your Honor has actually listened to it, but there's a lot of
7 garbled parts of that tape. The second thing we have is we have
8 Harpercollins' transcript of that tape recording, which is
9 attached as an exhibit to their motion.

10 And then we have Mr. O'Grady's affidavit, which also
11 is a transcript, in effect, a tape recording. And then we have
12 something else, we have Exhibit F to their own motion, which is
13 the original article that Mr. O'Grady wrote back in the '70s
14 where he again states verbatim what is supposed to be on this
15 tape, and there's lots and lots of discrepancies between
16 Mr. O'Grady's first publication of what is on this tape and his
17 later affidavit, which now coincides perfectly with
18 Harpercollins' transcript.

19 Let me give you a couple of those examples because
20 they're very substantive. First of all, if you look at Exhibit
21 F -- and, unfortunately, the print is real small. I don't
22 know -- it gave me a lot of trouble. I can sort of see it. But
23 if you look at Exhibit F to their -- I'm sorry -- Exhibit C -- I
24 was using my own -- Exhibit C on Harpercollins' motion, this is
25 the first O'Grady affidavit, the original one, and as an exhibit

1 to that affidavit, about four pages back or five is this
2 article, "Trauma Amid the Tippling," that Carl Wilson is
3 boozing. If you go to the second page of that, Carl -- let me
4 first point out, and you see there's a little inset picture, not
5 the big inset picture, but the little one in the middle of the
6 column, right below that picture --

7 THE COURT: Let me interrupt you just a second.
8 Would you go on my desk and get those Walgreen glasses I've got
9 that magnify things.

10 MR. LANGBERG: I had to try three pair before I could
11 actually see this thing.

12 THE COURT: I paid \$10 for mine at Walgreen's, a lot
13 better than these. Somewhere in this I'm supposed to be able to
14 read. I'll get these others.

15 All right. Where on the page?

16 MR. LANGBERG: The second page of the article.

17 THE COURT: All right.

18 MR. LANGBERG: Right below the small inset picture in
19 the middle column you see the words, "So" -- three dots -- "I
20 made another buy," three dots.

21 THE COURT: Right.

22 MR. LANGBERG: Now, if you compare that with the
23 language of their audio tape -- I don't know -- you see, "So I
24 made another buy." There's no three dots after the "so" here.
25 This says, "So I made another buy."

1 Mr. O'Grady's later transcription, the one that they
2 got, conforms to this; there's no three dots after the "so."
3 But when Mr. O'Grady first wrote what was said here, and if you
4 listen to the tape, there is something said between the "so" and
5 "I made another buy."

6 And Mr. O'Grady points -- makes that clear in his
7 original -- in his original article, and this happens a number
8 of times. There are a number of discrepancies. There's no
9 discrepancies of any merit, of any substance, between the
10 Harpercollins transcript and the second O'Grady affidavit, none
11 of any substance.

12 There are substantial discrepancies between the
13 Harpercollins transcript, second O'Grady affidavit, on the one
14 hand, and the O'Grady article that he wrote at the time, on the
15 other hand, and they're substantive, like the "so" and some of
16 the other ones.

17 For example, in the article it says -- the whole
18 article starts out differently. The transcript says, "There was
19 something about transcendental meditation." The preceding
20 statement was "transcendental meditation," and Carl answers sort
21 of sarcastically, and we put a question mark at it, "We were?"
22 And then he continues the mediator, and then there are some
23 ellipses that are left out of one and not the other.

24 In the Harpercollins transcript it says, "I got set
25 up. Someone in the group wanted heroin." In the article, the

1 original O'Grady article, it said, "Someone in the group was on
2 heroin." But the one thing -- and there's a half a dozen of
3 those kind of examples where ellipses are left out of the
4 Harpercollins transcript and the second O'Grady transcript which
5 obviously is made to conform to the Harpercollins and the
6 original publication by O'Grady of what was said.

7 Another time in the article, after the word "buy"
8 there's ellipses. In the Harpercollins and O'Grady transcript,
9 after the word "buy" there's no ellipses.

10 So you get to the point where you realize, and you
11 listen to the tape, and when you listen to the tape, you realize
12 that the original article that O'Grady wrote is a more faithful
13 reproduction of what was said, with the ellipses and all those
14 things that you can't hear.

15 But one thing is clear, it's clear from the tape,
16 it's clear from Carl Wilson's deposition, Carl Wilson said he
17 didn't buy any heroin for himself or anyone else. He also said
18 that he got some heroin from his brother, Dennis, who was a user
19 of heroin, and he took that heroin, and he flushed it down the
20 toilet because he didn't want them to use it. And that is not a
21 person who is buying heroin and supplying it.

22 Now, the second part of this issue is did Carl
23 Wilson -- does the article say -- does the book say that he
24 supplied heroin to his brothers? We know, Mr. Rich has pointed
25 out, and it's basic law, that you have to construe a defamatory

1 statement in the context in which it's made. And the context in
2 which this is made is the rest of the book and the rest of the
3 book that's relative is right in the -- in the pages following
4 and in the pages that we're talking about.

5 For example, Your Honor, we have a story on page 252
6 and 253 in the book where the phrase that we're suing on is
7 found which says that Carl Wilson -- and I'll read it -- "Carl
8 tried to calm the turbulence by admitting his involvement in the
9 purchase of heroin."

10 But what is in the very preceding paragraph? The
11 story of how Brian joined Dennis in snorting heroin. Well, what
12 heroin was "the purchase of heroin" that they're talking about
13 if it wasn't the purchase -- that's the only purchase of heroin
14 that was going on here, that's discussed here.

15 So if you read the whole two paragraphs together, we
16 know that that statement is accusing Carl Wilson of purchasing
17 heroin for his brothers. There's no evidence, no statements,
18 that -- anywhere, not only on this page or anywhere else -- that
19 Carl Wilson ever used it, that he bought it for himself.

20 The only people using heroin in the immediately
21 preceding paragraph are his brothers. And then "Carl trying to
22 calm the turbulence," according to them, "admitted to his
23 involvement in the purchase of heroin." Well, Carl has denied
24 his involvement in the purchase of heroin or any purchase of
25 heroin, and he's particularly denied his involvement in trying

1 to supply heroin to his brothers and, as a matter of fact, has
2 explicitly testified, and the tapes make it explicitly clear, he
3 keeps saying in the tapes, "I was set up. What I did was take
4 heroin that was given to me by Dennis, go up in the elevator and
5 flush it down the toilet."

6 This is not consistent with the statements that have
7 been published by Harpercollins in relation to this heroin
8 issue. So I think that the tapes are not only -- the
9 transcriptions of the tapes are not only misleading, but if you
10 look and listen -- if you listen to the tapes, what you find is
11 statements by Carl Wilson perfectly consistent with what he has
12 been saying all along, and that is that he didn't buy heroin and
13 that he flushed heroin down the toilet.

14 I think it goes a long way -- it's a long way -- the
15 truth is a long way from what's published here about purchasing
16 heroin.

17 Your Honor, the other statements I'd like to deal
18 with simply because we did deal with them in detail in the
19 papers statement by statement, I think that, as in the past, I
20 don't see any reason to reiterate the arguments we made.

21 Mr. Rich isolating each statement, not reading it in
22 context, as in this case, of what went before and what comes
23 after, says, well, how can this statement be imputed to mean
24 that the -- that Carl Wilson was callous to his brother's
25 sickness and only exploitive of his brother's business? And we

1 have statements that we've pointed out in the papers that say
2 "Carl was only interested, as the rest of the Beach Boys were,
3 in renting out the studio time and not interested in me getting
4 treatment. They were only interested in me performing and not
5 interested in me getting treatment, that it was too expensive."
6 And Carl -- in effect, the clear implication of the statements
7 concerning Dennis that we point out in the papers, Carl let his
8 brother, Dennis, die because he didn't want to spend the money
9 on Dr. Landy, and he was going on vacation and didn't want to
10 interrupt his vacation.

11 Carl Wilson has had his problems in life, and for
12 years, though, he's led what is -- what I think we could call an
13 exemplary life. If someone drags up the past, albeit long in
14 the past, and no matter the fact that he's leading an exemplary
15 life and he's actively against drugs and he's spent a lot of
16 money and a lot of effort to free his brother from Landy and
17 have this conservatorship established, albeit, all of that, if
18 someone dredges up the past, and it's true, the statements are
19 true, then I guess he -- it's terrible, but it's -- the law is
20 that he has to suffer through it.

21 But if you dredge up the past and make the statements
22 false, if you make them serve the purpose, as we talked about in
23 the argument over malice, if you make them serve the purpose of
24 the real author of this book, Gene Landy, and they're false,
25 then it's another story, then there's legal remedy, and that's

1 what we have here.

2 And in each of those statements taken in the context,
3 read in context of Carl being oblivious to his brother's needs
4 and actually trying to circumvent his -- getting his brother's
5 help, these are false statements, and these are defamatory
6 statements.

7 And the heroin one probably most of all, and, as I
8 say, Carl has testified at his deposition, he testified
9 unequivocally. He was asked about his involvement in the
10 purchase of heroin, the question was, "Which you did not?" And
11 he says, "Which I did not, and they knew it," and he said,
12 "Dennis put a package in my hand and I got rid of it."

13 And the question was, "You flushed it down the
14 toilet?"

15 The answer was, "That's correct."

16 You have the clear implication from the statement
17 that Carl Wilson purchased heroin for Brian, and there's no way
18 to circumvent that implication because it says that that is the
19 story of those two paragraphs, and that is false, it is
20 defamatory. And, as a result, the motion should be denied.

21 THE COURT: I'm going to put out a written opinion on
22 this motion which I hope will at least rise to the level of the
23 literary expertise of the book. In it I'm going to find that
24 the following pages do not say anything defamatory, and summary
25 judgment as to these pages will be granted, to the information

1 on these pages: 98, 252, 268, 332 to 333. As to the trickery
2 part of it, 351, 371, 387, 243, 373, 232, and 239.

3 As to the other parts of the motion, the remaining
4 pages that I have not mentioned, I'll deny summary judgment as
5 to the statements on those pages. I think there are questions
6 of fact for -- at least for a trial. The trial of this matter
7 will be September 15th. We'll pick a jury that day.

8 My experience in a lot of cases has been that the
9 plaintiff will just barely survive summary judgment, and then
10 this plaintiff is faced with judgment as a matter of law at the
11 end of the plaintiff's case. Sometimes the plaintiff will pass
12 that. Then they've got to go through the same thing at the end
13 of the case. Then they have to overcome the judgment
14 notwithstanding the verdict. That's happened in some of my
15 cases. I just throw that out to you as one of the procedural
16 things that does go on.

17 How long do you think it will take to try this case
18 now?

19 MR. DIXON: Your Honor, we'd have to go back and
20 look, what the pages Your Honor identified exclude from the
21 case. The summary judgment probably has reduced the scope of
22 the lawsuit somewhat. But I think it's accurate to state that
23 because of the extent of the damage claims that are being made
24 about lost economic -- economic injury to Carl -- we're still
25 talking about three weeks, three to four weeks. I think that

1 was our original estimate. Mr. Romero and I mentioned to you, I
2 think we said four weeks, but that could well change depending,
3 after we analyze the scope of the summary judgment, what it
4 removes from the case.

5 THE COURT: Okay.

6 MR. LANGBERG: I agree.

7 THE COURT: Well, all right. How does that -- how
8 does our schedule look?

9 THE CLERK: Well, we can't fit three weeks if we
10 start it on the 15th because of Duran but --

11 THE COURT: Oh, that's right, Duran is the 29th.

12 THE CLERK: Right.

13 THE COURT: Well, maybe it will go away. We'll see.

14 THE CLERK: Okay.

15 THE COURT: Three to four weeks is pretty difficult
16 to find with our criminal case loads here, but we'll try to work
17 it in. Was there a need for a Daubert hearing in this case? I
18 forget.

19 MR. DIXON: Yes, Your Honor. We have to look at the
20 nature of the testimony of Ms. Lashner, what it really would
21 apply to. In light of the rulings of the court, perhaps, there
22 will be some kind of a rethinking about whether she is even
23 necessary. If she is going to testify, we would need a Daubert
24 hearing. And I believe the terms of the court's order staying
25 this case until this summary judgment motion to be heard

1 provided for 45 more days of discovery from the date of the
2 hearing on the motion for summary judgment or the decision.

3 And I think that could be done, if it could be
4 accommodated in the court's schedule, but there would be a
5 Daubert hearing if Mrs. Lashner intends to testify on any of the
6 remaining issues in the case.

7 THE COURT: Well, what is this Mrs. Lashner going to
8 testify to?

9 MR. DIXON: Mrs. Lashner purports to be able to
10 divine from reading the book the author of the book, that really
11 it wasn't Brian Wilson who wrote the book, it was Eugene Landy,
12 it was someone else, and she does this without comparing the
13 book to any writing of Eugene Landy's or any writing of Brian
14 Wilson's.

15 She has these powers that apparently developed in the
16 early ecclesiastical law when people were ferreting out heretics
17 and would read text to determine if evidence of Satan was there.
18 This has become part of her expertise. I'm not saying she
19 purports to do that, but what I'm saying is that she purports to
20 be able to divine authorship with respect to written material by
21 some kind of an analysis, and we don't believe that will mean
22 meet the first basis of Daubert.

23 THE COURT: Sounds like she thinks she's a federal
24 judge, doesn't it?

25 MR. DIXON: Well, it sounds like she thinks she's a

1 federal judge, but the federal judges who ruled on her testimony
2 in the past have almost, to a man or a woman, declined to allow
3 her to testify, either on Daubert basis --

4 THE COURT: Well, what am I missing, why is that
5 testimony relevant?

6 MR. DIXON: We don't think it is.

7 THE COURT: Where we're seeking damages based on the
8 fact that he wrote the book and Harpercollins published it?

9 MR. LANGBERG: Your Honor, that -- first of all, it
10 is not a fair characterization of Mrs. Lashner's testimony.

11 THE COURT: I understand he's coming from his
12 standpoint.

13 MR. LANGBERG: No, I'm not even talking about the
14 characterization but the nature of it even. We're talking about
15 an expert in language and a person who can talk about the
16 interrelationship of paragraphs and how certain language is
17 used. And it may not be necessary, as counsel indicated. My
18 suggestion -- if I may -- is that in the next week that we talk
19 together after analyzing the court's ruling and reevaluate how
20 long this case is going to take to try, and reevaluate the
21 necessity of Mrs. Lashner and other people, and then come up
22 with perhaps what I think will be a new estimate of time -- at
23 least I have a good feeling that it will -- and then report back
24 to the court on that.

25 THE COURT: She is going to read this book and say

1 this paragraph interrelates with this other paragraph, and all
2 of that means this? Is that what you're telling me?

3 MR. LANGBERG: Your Honor, she's going to testify in
4 terms of -- in terms of how journalistic -- how writing style
5 and how language can be used, juxtaposing sentences or so forth
6 to create a certain effect or give a certain impression, so on
7 and so forth. This is testimony.

8 It's not true that Mrs. Lashner has been rejected by
9 every federal judge she's been in front of. As a matter of fact
10 she's testified as an expert many times. That's her testimony.
11 Her testimony is going to be expert testimony with respect to
12 the use of language, how it's used in this book to create
13 certain effects, to create certain impressions on the reader and
14 so on.

15 It is -- if I may, Your Honor, it is not uncommon
16 testimony in a defamation case to have expert testimony, expert
17 linguistic testimony, in terms of how language has been used or
18 manipulated and the context.

19 THE COURT: Now, where does she live?

20 MR. LANGBERG: She lives in Connecticut, in
21 Massachusetts, someplace like that.

22 THE COURT: I was going to say I have to be out in
23 San Diego the end of this month. If we needed to I could do the
24 hearing out there, but if she's in Connecticut I'll skip that.

25 MR. DIXON: I think she's lives in Philadelphia.

1 THE COURT: It's all one place back there.

2 MR. DIXON: Your Honor, I think, to the extent there
3 has ever been acceptance of this woman's testimony on the kinds
4 of things that Mr. Langberg is suggesting here, the court can
5 read the briefs, I won't try to argue it, but most courts, all
6 the federal courts that I'm aware of, have rejected her
7 testimony because what she purports to do is to reserve the role
8 of the jury and say, gee, this can be construed into a
9 defamatory, meaning this really means this even though it says
10 this, and those are quintessential jury questions, if there's a
11 factual question, so that's our position.

12 THE COURT: Well, that's like Mr. Langberg's idea,
13 you all get together next week and figure out where we're going
14 in this case. But we'll go ahead and pick our jury on the 15th.
15 I'll try to have our pretrial conference before that. How many
16 exhibits are we going to have in this case?

17 MR. DIXON: It again, Your Honor, is going to depend
18 on the extent to which -- how the summary judgment ruling
19 affects. I think there could be voluminous exhibits, if most of
20 the damage notions that have been advanced by the plaintiffs
21 remain in the case, because they're claiming loss of
22 merchandising revenue, they're claiming that the book destroyed
23 Carl Wilson, the Beach Boys' reputation as family entertainment.
24 So there's a need to go into royalties, attendance at concerts,
25 other factors that would have caused a diminution of the

1 reputation of all the Beach Boys including Carl Wilson. Those
2 kinds of things could be -- it could be quite document
3 intensive.

4 THE COURT: Okay. Well, we've got a visualizer in
5 this courtroom now, so that you can put your exhibits up on the
6 TV for them, and that makes the trial go a lot faster, get rid
7 of them that way, and --

8 MR. DIXON: Your Honor, would we have the opportunity
9 to use real time?

10 THE COURT: Sure. Yeah. I mean, that's why I have
11 this crack court reporter sitting here is to -- crack in the
12 sense of very sharp individual -- taking it down that way, so --
13 but --

14 MR. LANGBERG: We're way behind you where I come
15 from.

16 THE COURT: I'm sorry, sir?

17 MR. LANGBERG: We're way behind you where I come
18 from.

19 THE COURT: Oh, on real time?

20 MR. LANGBERG: Yeah, just on some sensationalized
21 cases they're probably familiar with it, but as a rule --

22 THE COURT: Well, we're pretty lucky, and I forget
23 how we got the visualizers, but Syd is -- there are only, like,
24 42 court reporters in the federal system who are qualified on
25 real time, and we have what two -- one -- two?

1 Yeah, we'll have real time. You can get daily copy
2 and all that from him if you want it, too. When you get your
3 notices setting, there will be a bunch of criminal cases in
4 front of you, I probably told you. So there will be 15 or 20
5 criminal trials. That means I may try one or two. So when we
6 say September 15th, we can pick the jury that day, if you really
7 tell me it's going to take that long to try, then I'll have
8 to -- to maybe send out a questionnaire to get jurors who can
9 spend 30 days with us. So maybe we can shorten it up somewhere
10 along the line. Have you had a settlement conference in this
11 yet?

12 MR. DIXON: No, we haven't, Your Honor. I think we
13 were all waiting to see what the disposition of the motion for
14 summary judgment was and maybe to make our disposition.

15 MR. LANGBERG: We've been actively -- Mr. Rich and
16 and I are on speaking terms. We've been actively talking about
17 that issue.

18 THE COURT: I hope you're on speaking terms.

19 MR. LANGBERG: Very much so.

20 MR. DIXON: I don't think a settlement conference
21 would be inappropriate in this case, though, in any event, if
22 Your Honor could schedule one.

23 THE COURT: All right. Who is the -- who --

24 THE CLERK: It's Judge Garcia.

25 THE COURT: Judge Garcia? Well, I'll try to get a

1 settlement conference scheduled for you with either Judge Garcia
2 or Judge DiGiacomo. And I'll try to get that opinion out within
3 the next week. Appreciate the quality of your briefs.

4 MR. RICH: Thank you, Your Honor.

5 THE COURT: Anything further we need to talk about?

6 MR. LANGBERG: No, Your Honor. Thank you again for
7 the scheduling, appreciate that.

8 THE COURT: That's no problem.

9 MR. RICH: Thank you, Judge.

10 THE COURT: We'll be in recess.

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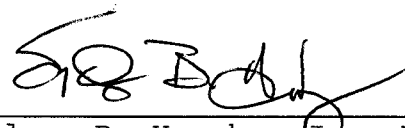
C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Sydney B. Huseby, Jr., RDR, CRR, Official
Court Reporter for the State of New Mexico, do hereby certify
that the foregoing pages 1-40 constitute a true
transcript of proceedings had before the said Court held in
the city of Albuquerque, Bernalillo County, New Mexico,
in the matter therein stated.

In testimony whereof, I have hereunto set my hand
on this 6th day of July, 1997.



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